87-1464

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SPIRO T. AGNEW and WILLIAM H. WOOLVERTON, JR.,

Petitioners,

– against –

ALICANTO, S.A. and WILLIAM H. SHAW,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does appeal lie from the interlocutory denial of a motion for attachment and vacatur of a temporary restraining order ancillary to the motion, when the defendants expressly concede that without a restraining order or writ of attachment, there will be no property within the jurisdiction against which the plaintiffs could satisfy a judgment?

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The petitioners Spiro T. Agnew and William H. Woolverton, Jr., respectfully pray that a writ of certiorari issue to review the summary order of the United States Court of Appeals for the Second Circuit filed on December 3, 1987.

OPINIONS BELOW

The unpublished summary order of the Second Circuit Court of Appeals of December 3, 1987 is printed in the appendix App. A-1.[1] The order appealed from, the unreported decision of the

[1] A citation commencing with "App." refers to a page or pages in the appendix.

United States District court for the Eastern District of New York, dated May 27, 1987 is printed as App. A-4. The transcript of the proceedings in the District Court on May 14, 1987 in which that court orally dissolved the temporary restraining order appears at App. A-8.

JURISDICTION

The order of the Court of Appeals for the Second Circuit denying rehearing was entered on January 21, 1988, App. A-13 and that court's order staying its mandate pending application for certiorari was entered on February 3, 1988. App A-14. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1987).

STATUTES INVOLVED

28 U.S.C. §1291 Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

New York Civil Practice Law and Rules, Article 62

For the purposes of this petition, the most relevant provisions are:

§ 6201 Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

4. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

§ 6210. Order of attachment on notice; temporary restraining order; contents.

Upon a motion on notice for an order of attachment, the court may, without notice to the defendant, grant a temporary retraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of section 6214. The contents of the order of attachment granted pursuant to this section shall be as provided in subdivision (a) of section 6211.

§ 6211. Order of attachment without notice.

(a) When granted; contents. An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount to be secured by the order of attachment including any interest, costs and sheriff's fees and expenses, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.

* * *

Federal Rules of Civil Procedure for the United States District Courts

For the purposes of this petition, the most relevant portion is:

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, . . . The remedies thus available include arrest, attachment . . . and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

STATEMENT OF THE CASE

The court of appeals decision of December 3, 1987, App. A-1, concludes with the statement, "We express no opinion on the merits of either the motion for order of attachment or the underlying case." Accordingly this petition is confined entirely to the narrow issue of appealability as defined by the December 3 decision. The facts and background are set forth below only to the extent necessary to acquaint the Court with the posture of the case at the time the district court made the order appealed from and the context in which that order was rendered.

District Court Jurisdiction

The plaintiffs, who are citizens and residents of the United States invoked the jurisdiction of the district court on two grounds: (1) under 28 U.S.C. § 1332, the defendants being (a) Alicanto, S.A., an Argentine corporation with its principal office in Buenos Aires, not qualified to do business in New York, and (b) Shaw, an Argentine national, resident in Buenos Aires. He is the chief executive officer and sole stockholder of Alicanto. Plaintiffs also invoke jurisdiction of the district court under RICO, 18 U.S.C. §1964(c).

Facts

Alicanto maintained an office in New York City and was engaged in representing American companies who wished to do business in Argentina. Plaintiff Woolverton is a former executive vice-president and director of the Alicanto.

For some months in 1980, Aydin Corporation, a manufacturer and constructor of telecommunications and other electronic systems, had unsuccessfully attempted to be invited to bid on an extensive telecommunications system for the Argentine armed services. Aydin's failure to gain entree to the then ruling Military Junta led to a meeting in Washington D.C. in October 1980 among the plaintiff Agnew, who had previously made the acquaintance of members of the Junta, Alicanto and Aydin. They there engaged Agnew to introduce Aydin to the Junta so it might qualify to bid on the telecommunications system. They agreed to compensate him for his efforts with a percentage of the payments that Aydin would receive from the Argentine government should it be successful in securing a contract for a telecommunications system.

Agnew then went to Buenos Aires, and called upon Junta members on Aydin's and Alicanto's behalf. Following negotiations for "a year or so," according to Shaw, Aydin was notified early in 1982 that it was to be awarded a contract for a telecommunications system for the Argentine air force.

However, long before that, in early 1981, not long after Agnew's October 1980 visit to Buenos Aires, Shaw fraudulently told him that his calls on Junta members had been fruitless because "for budgetary reasons" no contract was to be awarded. In fact, correspondence and a tape recording that Shaw sent to Woolverton establish that at the time of Shaw's misrepresentations to Agnew in early 1981, he, Aydin and Alicanto were actually in active negotiation for the telecommunications system with the Argentine air force that they ultimately contracted for and delivered.

Only in 1984, after Aydin's contract had been all but completed, did Angew learn of it. He called Shaw, who told him falsely that it had been a very small contract, on which Alicanto had received a very small commission, $60,000 or $160,000. He offered Angew $25,000. Angew accepted but was never paid despite repeated requests, ultimately being told falsely by Shaw that Argentine exchange restrictions prevented payment. In fact Shaw then had over a million dollars on deposit in New York City. Only in early 1985 did Agnew learn the truth: the Aydin contract was for $57 million, with Shaw and Alicanto receiving over $8,000,000 in commission.

Agnew and Woolverton make claims for breach of contract, services rendered, fraud and RICO injuries. Woolverton had performed extensive services for Alicanto on the Aydin contract but had never been compensated for them. His previous and unvaryingly extreme difficulties in extracting compensation from Shaw finally compelled him to recognize that Shaw had never intended to pay him for his services when rendered but only when and if it was essential to do so in order to induce Woolverton to render further services of equal or greater value.

Shaw and Alicanto had never intended to pay Woolverton for the Aydin contract because the promised percentage on it that was rightfully due Woolverton was so large as to be out of all proportion to the value of any and all future services that Woolverton might ever render.

Proceedings Below

On December 30, 1986, the plaintiffs brought suit and moved pursuant to Federal Rule of Civil Procedure ("FRCP") 64 ex parte for an order of attachment pursuant to the New York Civil Practice Law and Rules ("CPLR") § 6211 or in the alternative for a temporary restraining order ("TRO") under CPLR § 6210 prohibiting the transfer of certain assets of the defendants, pending the attachment motion. The court denied ex parte attachment but granted the TRO, setting the attachment motion for January 9, 1987.

The return date was thereafter repeatedly delayed for extended periods upon the defendant's successive requests with consents to corresponding extensions of the restraining order. Ultimately, on March 4, 1987, seven and one-half weeks after the date originally set by the court for return of the plaintiffs' attachment motion, the defendants moved for further protracted extension of the return on the ground that the plaintiffs' complaint and motion for attachment raised so many complex issues that it could only be adequately answered by the defendants preparing a motion for summary judgment to "be considered simultaneously with" the plaintiffs' motion. The extension requested by the defendants was granted upon their consent to a like extension of the temporary restraining order.

On April 24, 1987, fifteen weeks after the initial return date of the plaintiffs' attachment motion, the defendants served a 900-page summary judgment motion as their answer to the plaintiffs' attachment motion. Three weeks later, on May 14, 1987, in open court before the plaintiffs had had time to prepare a response to the defendants' 900-page motion, as the district court immediately acknowledged, App. A-9, 10, the defendants moved on one-day's notice to the plaintiffs, to dissolve the restraint and deny the attachment. The district court orally granted the defendant's motion in disregard of its order of March 4 directing that the plaintiffs' attachment motion and the defendants' summary judgment motion "shall be considered simultaneously." App. A-9, 10.

Upon the plaintiff's motion for rehearing, the district court adhered to his oral order of May 14 with his order of May 27, 1987, App. A-4, from which the appeal that is the subject of this petition was taken. On June 22, 1987, the court of appeals granted a stay of the district court's order pending appeal, which stay has been continued in effect by the court of appeals staying its mandate pending application for certiorari. App. A-14.

On October 2, 1987, while the plaintiffs' appeal from the denial of the attachment and dissolution of the TRO was still

pending and had yet to be argued, the district court denied in all respects the 900-page summary judgment motion that the defendants had submitted in support of their motion to dissolve the TRO and in opposition to the plaintiffs' motion for attachment.

REASONS FOR GRANTING THE WRIT

The decision that is the subject of this petition is in conflict with decisions of this court as well as of other federal courts of appeals, including decisions of other panels of the United States Court of Appeals for the Second Circuit. In addition, the decision of the court of appeals is plainly erroneous in that it does not address the grounds for the plaintiffs' appeal from the district court but rests instead upon a prior Second Circuit case, involving a factual framework entirely different from that in the present case.

I. The court of appeals decision is in conflict with decisions of this court and other courts of appeals

In *Swift & Co. Packers v. Compania Columbiana del Caribe*, 339 U.S. 684, 689 (1950) this court, by Mr. Justice Frankfurter, held that an order vacating an attachment is appealable, characterizing appellate review of an "order dissolving the attachment at a later date" as "an empty rite after [the property] had been released and the restoration of the attachment only theoretically possible." That is the situation faced by the plaintiffs here if the defendants' assets subject to the temporary restraining order are released.

On this, the defendants themselves have expressly made a critical and dispositive concession in their memorandum of law, dated June 9, 1987, filed in opposition to the plaintiffs' motion in the court of appeals for a stay pending appeal. There they categorically state, on page 3:

> We concede that plaintiffs have shown injury in the event the stay is denied by reason of the fact they will

> not have property in New York against which to satisfy a judgment.

There can be no question that following dissolution of the temporary restraining order, the defendants' assets now subject to it would be moved out of the United States and most likely out of Argentina, and thus put forever beyond the reach of any judgment the plaintiffs might obtain. In the course of their deposition of the plaintiff Woolverton, the defendants themselves took pains to make it clear that it was a common and ordinary practice for Argentinians to keep United States dollar assets, as are those subject to the temporary restraint here, outside of Argentina. If the defendants' assets are not subjected to restraint, there is no reasonable probability that the plaintiffs could ever again reach them.

In *American Oil Company v. McMullin*, 433 F.2d 1091, 1096 (10th Cir. 1970) the Court of Appeals for the Tenth Circuit specifically held that an order quashing certain writs of attachment was properly appealable as falling

> "[I]n that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated,"

quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

By the published decisions of the United States Court of Appeals for the Second Circuit as well as those of other circuits as they now stand, appeal is to all intents mandated for plaintiffs like those here who believe they have a meritorious basis for attachment, know beyond doubt that any judgment they get will be uncollectable without one, but are placed in the position in which the plaintiffs here were placed when the district court vacated their temporary restraining order and denied their motion for attachment.

Surely the thrust, the controlling principle and rationale of this court's decision in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., supra*, resides and inheres in the fact that review of an order dissolving an attachment only upon an appeal from a final judgment may be "an empty rite" as would be the case here. The defendants have forthrightly and unequivocally not only stated that they will move their property from the jurisdiction if and when the TRO is dissolved but have also made it clear that since the property consists entirely of United States dollars, they will not remove it to Argentina, the only other place where the plaintiffs might be likely to find them.

In dismissing the plaintiffs' appeal in this case, the court of appeals relies upon its decision in *Dayco Corp. v. Foreign Transactions Corp.*, 705 F.2d 38 (2d Cir. 1983), decided by a panel including two of the judges in the panel in this case, App. A-2. In doing so the court focused on the procedural aspect of the order appealed from rather than on the injury to the plaintiffs which was the concern of this court in *Cohen* and *Swift & Co.* as well as of many other courts in cases upholding appeals from the denial of security without which a judgment would be uncollectable.

As developed in Point II below, your petitioners believe that the Second Circuit here in its reliance on *Dayco* failed completely to apprehend numerous critical distinctions between *Dayco* and this case, most notably in failing to take into account that a critical ground of appeal in this case was the denial of due process of law to the plaintiffs in the district court's granting the defendants partial summary judgment without affording the plaintiffs opportunity to submit papers and be heard in opposition.

The conflict in decisions on the appealability of orders denying or vacating pre-judgment security are well illustrated by those of the Second Circuit itself. While your petitioners cannot possibly estimate the relative importance of the issue that is the subject of this petition in the entire scheme of the business of this Court, it is clear that in the face of the currently

outstanding decisions of the courts of appeals on this subject, a plaintiff who has had his motion for attachment denied, as these plaintiffs have, with no other source of recovering on a judgment faces the necessity of making an appeal. As the reported case law now stands in the Second Circuit, the mathematical laws of probability give him a better chance of having the issue held appealable than non-appealable.[2]

On September 28th of this year, after this case had been fully briefed, a panel of the Second Circuit handed down its decision in *H&S Plumbing Supplies, Inc. v. BancAmerica Commercial Corp.*, 830 F.2d 4 (2d Cir. 1987). Although that case concerned an appeal from the denial of an order to vacate a notice of pendency, rather than denial of an attachment, it discussed *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and its progeny at some length and noted, as dictum, 830 F.2d at 6:

> In the context of pre-judgment orders concerning attachments, we have permitted appeals from orders denying such remedies, *Maryland Tuna Corporation v. Ms. Benares*, 429 F.2d 307 (2d Cir. 1970); *Chilean Line Inc. v. United States*, 344 F.2d 757 (2d Cir. 1965); *Republic of Italy v. De Angelis et al.*, 206 F.2d 121 (2d Cir. 1953) *but see Dayco Corporation v. Foreign Transactions Corporation, et al.*, 705 F.2d 38 (2d Cir. 1983) * * *

In addition the same court has in *Brastex Corporation v. Allen International, Inc.*, 702 F.2d 326 (2d Cir. 1983) upheld the appeal from an order denying appellant's motion to confirm an

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[2] Based upon the present composition of the Court of Appeals for the Second Circuit and its published decisions on the issue, five of the active judges have held such decisions to be appealable: Circuit Judges Altimari, Miner and Newman in *H&S Publishing Supplies*, referred to in the following paragraph, and Circuit Judges Kearse and Pierce in *Brastex*, also cited below. In *Dayco Corp. v. Foreign Transactions Corp.*, *supra*, Circuit Judges Meskill and Pratt have held them to be non-appealable, while of the sitting retired Judges, Circuit Judge Van Graafeiland has voted against appealability, and Circuit Judge Timbers, for it, in *Braxtex*, although against it in this case.

ex parte order of attachment, citing *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., supra*, and *Cohen v. Beneficial Loan Corp., supra.* In *Glaser v. North American Uranium and Oil Corp.*, 222 F.2d 552 (2d Cir. 1955) the Second Circuit sustained an appeal from an order vacating and setting aside a warrant of attachment and levy, citing *Cohen, Swift & Company* and *Republic of Italy v. De Angelis, supra.*

In Chilean Line Inc. v. United States, 344 F.2d 757, 759 (2d Cir. 1965) the Second Circuit court held:

> Here the denial of the attachment has the same effect as the vacating of a previously granted attachment since in both cases the property sought to be levied upon may be irrevocably lost by the time the issue is finally resolved at trial.

The foregoing Second Circuit decisions are compatible with what appears to be the nearly unanimous law in other circuits H in regard to the appealability of decisions denying plaintiffs security *pendente lite* where it appears that any final judgment will prove uncollectable without it. *See* the Third Circuit in *FDIC V. Greenberg*, 487 F.2d 9 (3d Cir. 1973) (order vacating attachment of realty reversed on appeal.) *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982). (order vacating notice of lis pendens as unconstitutional reversed on appeal.) *Britton v. Howard Savings Bank*, 727 F.2d 315 (3d Cir. 1984) (denial of motion for an attachment appealable, citing *Swift & Co. Packers v. Compania Columbiana del Caribe*, 339 U.S. 684, (1950); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, (1949).)

Also the Fifth Circuit in *Beefy King International Inc. v. Veigle*, 464 F.2d 1102 (5th Cir. 1972) (order discharging lis pendens appealable.) The Seventh Circuit. *Suess v. Stapp*, 407 F.2d 662 (7th Cir. 1969) (order cancelling notice of lis pendens appealable, citing *Cohen, supra.*) to the same effect are the Eighth Circuit in *Keith v. Bratton*, 738 F.2d 314, 316 (8th Cir. 1984) (release of notice of lis pendens held appealable, citing *Cohen, supra*; possibility that property could be sold before conclusion of the action would result in irreparable harm to the

plaintiffs, citing *Chrysler Corp., supra.*) the Ninth Circuit, *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 630 (9th Cir. 1982) and in the Tenth Circuit, *American Oil Co. v. McMullin, supra*, 433 F2d 1091 (10th Cir., 1970)

All of the decisions cited above, not excluding *Dayco*, as will be shown, which have held an order denying a motion to confirm an ex parte attachment appealable, would reasonably lead a plaintiff in the position of these plaintiffs to take an appeal from the vacatur of a restraining order and denial of attachment. Under existing authority in the Second Circuit, counsel to a plaintiff in these plaintiffs' position at the time they appealed, would, it seems, perforce be obliged to advise his client that there was clear precedent for the appealability of an order releasing the defendants' property from a restraining order and denying attachment.

Additionally because of the present diversity of opinions among the circuits as well as within the Second Circuit, if appeal was not initially successful, he would be obliged to advise his client that there was a basis for a petition for rehearing as well as for petition to this Court for a writ of certiorari, notwithstanding the mathematically low probability that it would be granted. This imposes an unnecessary burden on the judicial system. For that reason, granting the writ in this case and deciding the matter would not only serve the interests of justice, but would also do away with the contradictions that now prevail, thereby saving the time and expense of judiciary and litigants.

II. The Decision of the court of appeals is plainly erroneous

In the present case, the foreign defendants have expressly stated in writing, as quoted above, that if the restraining order is dissolved and attachment denied, the plaintiffs "will not have property in New York against which to satisfy a judgment." However, contrary to what had been held in *Chilean Line Inc., supra*, the court below has held in dismissing the present appeal App. A-2:

> But in *Dayco*, we distinguished orders denying or refusing to confirm orders of attachment which are not appealable, from orders vacating attachments, which are. The instant case falls into the former category.

In so holding, the decision appears to have put form ahead of substance. Previously, in *Glaser v. North American Uranium and Oil Corp., supra*, 222 F.2d 552, 554 (2d Cir. 1955) this same court held:

> Should the plaintiff be denied appellate review until the whole case is finally adjudicated, judicial support of its position as to the validity of the attachment at that stage would in all probability be a hollow victory.

In 15 C. Wright A. Miller & E. Cooper *Federal Practice and Procedure* § 3911 at 492 (1976), as quoted by the court below in *H & S Plumbing Supplies Inc. the BancAmerica Commercial Corp., supra*, 830 F.2d at 6, the rule is stated that " 'the practical risk that any final judgment will prove uncollectable is sufficient to allow collateral order appeal . . .' " In this case, defendants have made it a certainty that "any final judgment will prove uncollectable" by their frank assertion that they will remove their funds from the jurisdiction if the TRO is dissolved.

In dismissing the plaintiffs' appeal, the court below quoted 9 J.Moore, B. Ward, J. Desha Lucas, Moore's Federal Practice ¶110.13[5] at 171 (2d ed. 1987) "(order denying attachment ordinarily non-appealable)." App. A-2. What Moore says in toto is that "ordinarily an order granting or denying, or vacating or refusing to vacate, an attachment is interlocutory and non-appealable." The text discloses that none of the cases cited in that section of 9 Moore support the statement that an order denying an attachment is "ordinarily non-appealable."

With the critical element in *Swift & Co.*, its holding that appeal from a denial of attachment becomes "an empty rite" when postponed to appeal from final judgment, the examples of non-appealability cited by Moore in support of this proposition are not apposite to *Swift & Co.* Certainly none of them is applicable

to this case where the defendants have expressly stated that without an attachment, plaintiffs will be injured because "they will not have property in New York against which to satisfy a judgment," as set forth above.

Curiously, Moore's entire analysis following the passage quoted above contradicts, rather than supports, the proposition relied upon by the court of appeals. Moore says "An order denying the right to garnish the United States . . . has been held appealable." *Id.* at 172. Likewise with "An order refusing to require security for damages for wrongful attachment . . ." The same with "an order cancelling a notice of lis pendens . . ." Indeed, the context in which the quoted proposition relied upon by the court of appeals appears is in every respect inconsistent with that proposition, the principal cases cited being this Court's decisions in *Swift & Co.* and *Cohen*.

Certainly the two cases discussed by Moore where orders were held to be nonappealable do not tally with the present case. In *West v. Zurhorst*, 425 F. 2d 919 (2d Cir., 1970) the court below held an order refusing to vacate an attachment not appealable, which hardly fits the "empty rite" holding of *Swift & Co.* The same is true of *21 Turtle Creek Square Ltd. v. New York City Teacher's Retirement System*, 404 F.2d 31 (5th Cir. 1969) in quite a different sense. That case denied appealability of an order quashing attachment according to Moore "unless the plaintiff can show that he is harmed by lack of prejudgment security," the very harm that the defendants here have expressly conceded in writing. Citing *Cohen* and *Swift & Co.*, the Court of Appeals for the Fifth Circuit, 404 F.2d at 32-33, speaking obiter said:

> [3,4] Later decisions of the Supreme Court have expanded the scope of final judgments beyond the limited class encompassed by the traditional rule and have stressed that the definition of a final judgment is a pragmatic one. *Gillespie v. United States Steel Corp.* (1964), 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199; *Cohen v. Beneficial Indus. Loan Corp., supra.* Thus the court has held final and appealable ancillary

> orders which determine substantial rights of the parties which, if not promptly reviewed, will subject the appealing party to irreparable harm. [citations omitted]. *Swift* and *Cohen* indicate the general and consistent approach that an order is "final" only if it terminates the matter in controversy below. When a seemingly interlocutory order has been held appealable, it has been on the theory irreparable injury will result from dismissal of the appeal or that the particular narrow issue with which the order was concerned is wholly separable from the remainder of the case and the order terminates the separable issue . . . In addition, counsel during oral argument admitted that there is no question of loss of security should *Turtle Creek* prevail. Hence the *Swift* and *Cohen* rationale predicated upon irreparable loss of rights is inapplicable here.

In short, in *21 Turtle Creek*, counsel for the plaintiff admitted that there would be no injury to his client, the very opposite of the situation here where counsel for the defendants has expressly conceded that the plaintiffs will be injured if "the stay is denied." 8, *supra*.

In concentrating entirely on the narrow, technical aspect of only one branch of the district court's order, the denial of the plaintiff's motion for attachment, the court below ignored completely the second, equally critical aspect of the order appealed from, its dissolution of the temporary restraining order, granted the plaintiffs on December 30, 1986, under CPLR 6210, and retained in effect for five months at the express instance of the defendants through repeated requests for extensions of time to prepare their summary judgment motion.

It was this restraining order, not the pendency of the attachment motion that prevented the defendants from removing their property from the jurisdiction pending resolution of the attachment motion. This brings the effect of the order appealed from squarely within the rationale and underlying purpose of the Second Circuit decisions asserting the appealability of orders

vacating attachments, which the decision below also says are appealable. App. A-2. CPLR 6210 was adopted in 1977 following decisions in this and other courts invalidating attachments granted ex parte under statutes that did not afford the defendant an adequate hearing before issuance of the writ. 7A Weinstein, Korn and Miller *New York Civil Practice*, ¶6201.04 at 62-15.

Prior to the adoption of 6210, the procedure set forth in both the CPLR, and its predecessor, the Civil Practice Act, provided only for an ex parte attachment, *id.* at 62-82, with the defendant's having no opportunity to oppose except by motion after his property had been attached ex parte without prior notice. CPLR 6210, added in 1977, provides for:

> A temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of Section 6214.

As stated in Weinstein, Korn and Miller, *New York Civil Practice*, id.:

> The temporary restraining order is designed to protect the plaintiff during the period which will elapse from the time the plaintiff moves for an order of attachment to time the sheriff is able to levy upon each garnishee under the order, after it has been granted.

In other words, a temporary restraining order under § 6210, as was granted here, performs the same function and has the same effect in regard to the rights of the parties in the defendant's property as the ex parte order of attachment under 6211, or as it was under the pre-1977 procedure which provided only for ex parte orders of attachment. For the court below to hold that a decision vacating an ex parte attachment is appealable but that vacatur of a temporary restraining order performing the same function is not, is to draw a distinction predicated entirely on form rather than substance.

Comparison of the *Dayco* case to the present case demonstrates the existence of sharp and critical contrasts between the two in regard both to supporting facts and applicable state

law. Although the decision to which this petition is addressed disclaims any "opinion on the merits of either the motion for order of attachment or the underlying case." App. A-2, it appears clearly that *Dayco* turned on a finding of fact, which not only has no counterpart in the present case, but as to which the exact opposite is incontestably established in this case.

The key passages in *Dayco* in regard to its relationship to the present case appear to be the following:

> One of the grounds for granting an attachment, the *one upon which appellant relies*, is that the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the State, or is about to do so. C.P.L.R. § 6201(3). The district court found that appellant had not sustained its burden of proof on this issue. This was a finding of fact, leading to the discretionary determination made by the district court.

705 F.2d at 39. [Emphasis added.]

> Resolutions of issues of fact seldom lead to the establishment of meaningful precedents, and there is little likelihood of reversal for abuse of discretion or for clearly erroneous findings.[3]
>
> * * *
>
> Resolution of the issue in the instant case—whether the district court correctly applied well-settled rules of law to *disputed facts*—will establish no precedent and will affect only the parties.

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[3] This language raises a question as to the basis of the court's holding in *Dayco*. CPLR §6201 enumerates the jurisdictional grounds for the grant of an attachment. Very clearly a New York court cannot entertain a motion for attachment unless the plaintiff makes a prima facie showing of the existence of one or more of the four grounds set forth in CPLR 6201. There is no indication that the court has discretion to grant an attachment in the absence of any such showing.

705 F.2d at 40. [Emphasis added.]

In actuality it appears that there was no issue of fact in *Dayco* at the time the district judge made the decision that was the subject of the Second Circuit opinion on appeal. She expressly states that "the issue here under discussion [was] defendant's *intent* to remove or secrete assets so as to frustrate a judgment." App. A-31. [Emphasis added.] The plaintiff had argued that the defendants' admission of fraudulent conduct prior to Dayco's bringing suit "[gave] rise to the necessary inference of future intent under § 6201(3)" App. A-25, and, therefore, the plaintiff contended, it was reasonable to infer that the defendant's intent at the time the plaintiff moved to confirm its ex parte attachment was "to defraud and frustrate a judgment in [plaintiff's] favor." App. A-26.

However, it appears that this issue was conclusively disposed of before the district court made its decision because significantly it went on to say, App. A-28:

> It thus appears *and the parties agree*, that the above "admissions" [as to the prior fraud] of Mrs. Reich [the dominant defendant], in and of themselves do not give rise to the inference that she harbors a present intent to frustrate a judgment in the case if one is obtained by plaintiff. [Emphasis added.]

In *Dayco*, this court noted "appellant may move again for attachment should changed circumstances or newly discovered facts warrant such provisional relief." 705 F.2d at 40. In the present case, the court of appeals says, A-2:

> As in *Dayco*, the order here also lacks finality because it is subject to a renewed motion upon a showing of changed circumstances.

Under the cirumstances of this case, this statement by the court like the provision in the order appealed from upon which it is based is no more than a concatenation of words, parsing properly to form a sentence but without intrinsic meaning. Once

the defendants have removed their property from the jurisdiction, which they state unequivocally they will do upon dissolution of the temporary restraining order, there are no reasonably conceivable "changed circumstances" that could lead to a renewed motion. There simply will be nothing that the plaintiffs could attach.

In this respect there is no parallel between the present case and *Dayco*. To be more than the "empty rite" and "hollow victory" spoken of by this Court in *Swift & Co.* and by the Second Circuit in *Glaser*, Dayco's right to move again for attachment could have had meaning only if the defendant had property within the jurisdiction against which it could move. That this was indeed the fact appears abundantly from the district court decision in *Dayco*, e.g. App. A-30, 32, 31, but there is nothing here to indicate that once the defendants' property now subject to the TRO is gone, as defendants say it will be if the district court decision stands, the plaintiffs would ever again be able to find property of the defendants' that they could attach. In *Dayco*, on the contrary, the court found insufficient evidence to support plaintiff's claim that defendants' had transferred funds out of New York. *Id.*

In short *Dayco* denied attachment precisely because the plaintiff there was unable to submit proof to support his assertion under CPLR 6201(3) that "the defendant, with intent to . . . frustrate the enforcement of a judgment" had or was about to assign, dispose of, secrete or remove property from the state whereas the defendants here have explicitly declared such an intention to the court of appeals, thereby giving the plaintiff the right to an attachment not only under CPLR 6201(1) under which they originally moved but also under 6201(3).

Accordingly in this case there is not and could not have been any dispute of fact or finding adverse to the plaintiffs and correlative to *Dayco* in regard to the applicability of CPLR 6201(1). The district court did not purport to make any such finding in the order appealed from, App. A-4. It denied the attachment "on the ground that plaintiffs had not shown a probability of

success on the merits," App. A-6, an area expressly omitted from consideration by the court of appeals in making its December 3rd decision. App. A-2.

The facts found by the district court in *Dayco* that the defendants had not removed any of their property from the jurisdiction in order to frustrate a judgment and had not demonstrated any intent to do so made a practical and enforceable actuality of the right given to Dayco to renew its motion for attachment upon a showing of changed circumstances. This is a far cry from the factual unreality of the "right" to a renewed motion given to the plaintiffs by the district court here:

> [T]he parties [sic] may move upon 15 days notice for a temporary restraining order with an evidentary hearing to be arranged by the court . . .

A-8c. Since the Argentine defendants have explicitly announced that the plaintiffs would "not have property in New York against which to satisfy a judgment" if a stay of the district court order dissolving the temporary restraining order were to be denied, it requires no imagination to predict what they would do with any assets they might have in New York at some later date if they were given fifteen days notice of a motion by the plaintiffs for a temporary restraining order with a hearing to follow.

As noted, in *Dayco* the appellant argued that it was entitled to an attachment under CPLR 6201 (3) on the ground that the defendant "with intent to defraud his creditors or frustrate the enforcement of a judgment" had "assigned, disposed of, encumbered or secreted property, or removed it from the State, or [was] about to do so." As to this contention, there was, this court said in *Dayco*, an issue of fact. 705 F2d at 39. However, there is no corresponding or comparable issue here as to the applicability of CPLR 6201 although there are abundant issues of fact involved in the merits of the case, as demonstrated by the district court's complete denial of the defendants' summary judgment motion.

In regard to CPLR 6201(1), however it is uncontested that defendants are respectively a domiciliary of Argentina and an

Argentine corporation not qualified to do business in New York, thereby constituting a basis for a motion for attachment. It is equally uncontested that defendants have said that they will remove their property from New York if the restraining order is vacated and attachment denied. Although the plaintiffs did not seek attachment under CPLR 6201(3), as the plaintiff did in *Dayco*, this assertion by defendants establishes the plaintiffs' right to more for attachment under that provision as well as under CPLR 6201(1).

In *Dayco* as well as here, the court below held the district court decision not appealable because the only issue was "whether the district court correctly applied well settled rules of law to disputed facts." 18, *supra*, App. A-2. That analysis does not apply to this case because as has been shown here, there is no dispute of fact as there was in *Dayco*. On December 30, 1986, the district court granted a temporary restraining order, indicating that the law and facts shown by the plaintiffs justified such an order. On May 14, 1987, however, with the defendants' summary judgment papers before it, and without the plaintiffs having been afforded the opportunity to answer them, as the court acknowledged, it dissolved the TRO. App. A-9, 10. On this, there is no dispute, and as it is a principal basis for plaintiffs' appeal, it cannot, in view of the court of appeals' expression of no opinion on the merits of motion or case, App. A-2, have been considered by that court in dismissing the appeal.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review its order and opinion in this case.

Respectfully submitted,

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